

# Michigan Foreclosure Seminar

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# Public Acts 29-31

- Effective July 5, 2009 (Two year sunset)
- Applies to primary residence (tied to homestead exemption)
- Additional notice of right to workout discussions
  - Mail certified and 1<sup>st</sup> class mail.
    - This is new date of first legal.
  - Must publish different notice once within 7 days.
    - Includes address
  - Borrower has 14 days to respond and request meeting through housing counselor.
  - Housing counselor then has 10 days to notify lender/servicer/designee.

# Public Acts 29-31

- If no request for meeting, you may foreclose by advertisement.
  - 25 days/30 days
- If Borrower responds and requests meeting, 90 day “stay”. Contact through credit counselor.
- During that time, must meet to discuss loan modification/workout possibilities.
  - Meetings to be held in county where property is located or mutually agreeable place.
- Designee may request financial information necessary to determine.
- Borrower may request HUD approved housing counselor be present



# Public Acts 29-31

- If deal made, document and execute.
  - Borrower must return executed loan modification offered in good faith under this program within 14 days. If not, you may foreclose by advertisement.
- If no deal made, issue becomes whether one “should have been made”.
- Test:
  - If Government loan or GSE loan, use loan modification of applicable entity.
  - If conventional loan...

# Public Acts 29-31

- Test is modified version of HAMP
  - Target 38% of Borrower's Gross Monthly Income
  - Does not take into account other debt
  - Can you lower total housing debt to 38% by:
    - Lowering interest rate to floor of 3%;
    - Amortizing loan over 40 years;
    - Eliminating late fees; and/or
    - Forbearing principal (capped at 20%) until end of loan period.
- Statute does not call for waterfall;
- Use one or more elements

# Public Acts 29-31

- If, using applicable test, borrower qualified for a loan modification and one was not offered, must foreclose judicially.
  - Longer, more expensive option..
- Does not limit loss mitigation options. Can make deal using other methods.



# Preliminary Questions

- Has Mortgagor breached a covenant?
  - Typically payment. Can be other items, including taxes, insurance, waste, etc.
- Is foreclosure the best solution?
  - Lost money in foreclosures
  - Alternatives:
    - Forbearance Agreements
    - Deed in Lieu
    - Reinstatement

# Preliminary Questions

- Get Title Commitment/Foreclosure Sale Guaranty
- Any sign that property is abandoned?
- Does mortgage contain special notice requirements
  - E.g., certified mail, notice to different address
  - Typically in second home situation



# Foreclosure by Advertisement vs. Judicial Foreclosure

- MCLA §600.3201 *et. seq.*
- “Every mortgage of real estate, which contains a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement.”
- Faster, less expensive
- One of limited number of states with non-judicial remedy

# Foreclosure by Advertisement

- Must have a power of sale clause. MCLA §600.3201; *Bradway v Miller*, 200 Mich 648 (1918).
- Mortgagor must have breached a covenant of the mortgage. MCLA §600.3204(1)
- No other action pending to recover the debt. MCLA §600.3204(2)

# Foreclosure by Advertisement

- Must be owner of indebtedness, have interest in indebtedness, or be servicing agent at time of first publication.



***Davenport v. HSBC Bank USA***  
**2007 Mich. App. LEXIS 1078**  
**(Mich. Ct. App. 2007)**

- Defendant admitted that it did not own mortgage at time of first publication. Why?
- What the case stands for:
  - Mortgagee must meet standard of MCLA §600.3204(1)(d)
    - Must be owner of indebtedness, have interest in indebtedness, or be servicing agent at time of first publication.
    - Obligation is independent of obligation in MCLA §600.3204(3) to have record chain of title.
    - Found foreclosure void, not voidable.
  - Probably limited to facts as litigated.

# The Notice of Foreclosure

- MCLA §600.3212 requires:
  - Name of Mortgagor
  - Name of original mortgagee and/or foreclosing entity
  - Date of Mortgage
  - Date of recording
  - Amount claimed due on date of notice
  - Legal Description
  - Length of redemption period

# The Notice of Foreclosure

- Although not required, typically also contains:
  - Interest rate
  - Time and place of sale
- Errors:
  - *Guardian Depositors v Keller*, 286 Mich 403 (1938) (slight/inconsequential mistakes insufficient to void foreclosure sale).



# The Notice of Foreclosure

- Defective notice makes sale voidable, not void.
  - *Fox v Jacobs*, 289 Mich 619 (1939); *Jackson Investment Corp. v Pittsfield Products, Inc.*, 162 Mich App 750 (1987) (illogical to void sale if no harm suffered).
- No bright line test. Substantial compliance.
  - Look at effect on persons interested

# The Notice of Foreclosure

- Defects making sale voidable:
  - Failure to name wife of mortgagor. *Oades v. Standard Sav. & Loan Ass'n*, 257 Mich. 469 (Mich. 1932)
  - Major Misspelling of Mortgagor's name. *Lee v. Clary*, 38 Mich 228 (1878); *Zlotoeczski v. Smith*, 117 Mich 202 (1898).
  - Inaccurate Description of Property. *Vary v. Chatterton*, 50 Mich. 541 (1883).

# The Notice of Foreclosure

- Defects that substantially comply:
  - Minor misspelling of Mortgagee's name. *Reading v Waterman*, 46 Mich 107 (1881).
  - Minor error in description. *Snyder v Hemmingway*, 47 Mich 549 (1882).
  - Date of amended mortgage. *Calvert Associates v Harris*, 469 F.Supp. 922 (E.D.Mich. 1979).



# The Notice of Foreclosure

- Defects that substantially comply:
  - Lack of book and page number of recording. *McCammon v The Detroit, Lansing & Northern Railroad Co.*, 103 Mich 104 (1894).
  - At which door of courthouse sale is held. *Bass v Federal Land Bank of St. Paul, Minnesota*, 300 Mich 418 (1942).
  - Amount claimed due, if in good faith. *Flax v Mutual Building & Loan Ass'n of Bay County*, 198 Mich 676 (1917).

# The Notice of Foreclosure

- Defects that substantially comply:
  - Gender of Mortgagor. *Worthy v World Wide Financial Services, et al*, E.D. S.D. MI. Civil No. 04-72969 (unpublished).

# Publication and Posting

- MCLA §600.3208

- Notice shall be given by publishing for 4 successive weeks at least once in each week.
  - Newspaper published in county where property situated; if none, adjacent county.
  - Publication must be for at least 28 days (i.e., 4 FULL weeks).  
*Jackson Investment Corporation v. Pittsfield Products, Inc.*, 162 Mich App 750 (1987); *Casey v Goetzen*, 240 Mich 41 (1927),
- Copy of notice posted in conspicuous place within 15 days of first publication.



# Publication and Posting

- No requirement that junior lienholders get notice.
  - MCLA §559.208 requires notice be given to condo association within 10 days after first publication.
- If affidavit of posting executed, mortgagor has burden of proving property not posted. MCLA §600.3264; *Walsh v Colby*, 153 Mich 602 (1908).

# The Sale

- MCLA §600.3216
  - Between 9:00 a.m. and 4:00 p.m.
  - Circuit Court
  - Must be conducted so that person of ordinary intelligence understands what property is being sold.  
*Hogan v Hester Investment Co.*, 257 Mich 627 (1932).

# Adjournments

- MCLA §600.3220.
  - May be adjourned on weekly basis by posting.
  - More than weekly at one time requires publishing.
  - Often misunderstood.



# Redemption

- MCLA §600.3240
  - Essentially, 6 months unless greater than 3 acres.
  - If so, than 1 year.
  - Rationale for extended redemption period.

# Redemption

- MCLA 600.3240(2).
  - ROD will not calculate amount (Except Oakland and Macomb Counties. HB 5267)
  - Purchaser must include affidavit with deed
    - Precise amount needed to redeem.
      - Plus taxes, condo/homeowner association taxes, amount to redeem senior liens, insurance premiums.
    - Date redemption expires
    - May include designee to aid in redemption
    - Stuck with calculation
    - May charge fee

# Redemption

- Shortening Redemption if abandoned:
  - Post-publication. MCLA §600.3241a.
    - Post and mail notice.
    - Not rebutted within 15 days.
    - 30 days/within time to rebut, whichever is later. MCLA §600.3240(11).
  - Recent change: PA 579 of 2006
    - Can shorten at any time in process until redemption ends.
    - Can shorten if more than 3 acres
    - Trigger event is sending of notice.
  - Recent Case: *Hartstock v. FHLMC and Orlans, Associates*
    - Lesson is the same—need good lawyering!



# Evictions

- Current trends/issues:
  - Local ordinances requiring owner to place large movable container on private area of owner's property for disposal of personal property.
    - Must be removed within 48 hours
    - Large fine if violated.
    - Cumbersome, but may be valid public policy.

# Judicial Foreclosures

- Jurisdiction in Circuit Court. MCLA §600.3101.
- Venue where property is located. MCLA §600.1605.
- Must include anyone with interest in the property.
  - Must obtain service on all parties.

# Judicial Foreclosures

- Sale may not take place within 6 months of the filing of the Complaint. MCLA §600.3115.
- Publish for 6 weeks prior to sale. MCLA §600.6052(2).
- Post in 3 public places in township or city. MCLA §600.6052(1).



# Judicial Foreclosures

- Court may fix upset price. MCLA §600.3165.
- May not shorten redemption period if abandoned.

# Mortgagor in the Military

- Servicemembers' Civil Relief Act

- Intended to protect mortgagors who enter **active military service** after entering into mortgage.
- Absent obtaining a court order or agreement, may not foreclose during active service or within 90 days.
  - Extended to 9 months (until 12/31/10).
  - Recent Michigan statute changed to 6 months for Michigan, only. PA 138 (May, 2008).
  - Applies to situations where service member entered into mortgage before active duty or where service member is on overseas duty.
- Also affects interest rate that may be charged.
- Can check at:

<https://www.dmdc.osd.mil/scra/owa/home>

# Contact Information

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